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DEPARTMENT OF THE NAVY
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IN REPLY REFER TO:

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From: Commander, Naval Supply Systems Command
To: Distribution

Subj: NAVY POLICY ON NATIONAL PRIORITIES LIST SITE AGREEMENTS *(Installation Restoration)*

Encl: (1) CNO ltr 5090 Ser:453/8U536094 dtd: 19 Sep 88

1. Enclosure (1) is a model for Federal Facility Inter-Agency Agreements format to be followed for legal language and schedule purposes. If you should enter into such an agreement with EPA on a NPL site under the Installation Restoration program, the enclosed format is to be used. However, your serving EFD has the lead action on this item. The document is forwarded to you for information purposes.

L. N. Williams
L. N. WILLIAMS
By direction

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DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
WASHINGTON, DC 20350-2000

IN REPLY REFER TO
5090
Ser 453/8U586094
19 Sep 1988

From: Chief of Naval Operations
To: Distribution

Subj: NAVY POLICY ON NATIONAL PRIORITIES LIST SITE AGREEMENTS

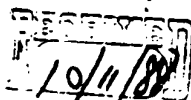
Ref: (a) CNO Washington DC 241556Z Dec 87 (NOTAL)
(b) CNO ltr 5090 Ser 453/8U584763 of 26 May 1988

Encl: (1) Guidance on National Priorities List Site Agreements

1. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires that the Navy enter into an interagency agreement (IAG) with the Environmental Protection Agency (EPA) before actual cleanup can commence at National Priorities List (NPL) sites. The Deputy Assistant Secretary of Defense (Environment) has negotiated with Headquarters, EPA boilerplate language for Federal Facility Agreements Under CERCLA Section 120. The specific policy and guidance, enclosure (1), shall be used as a basis for negotiating these agreements. This letter supersedes the policy provided in reference (a).

2. Over the past year, DoD has established policy in this area. These policies are not changed by the enclosed guidance. Pertinent DoD/Navy policy is summarized below:


- o Navy shall enter into Federal Facility Agreements at its NPL sites as early as possible during the Remedial Investigation/Feasibility Study (RI/FS). These agreements are a high priority and contain many benefits if they are properly structured. They are intended to improve communications between all parties by allowing EPA and the state to review all work, and ultimately make selection of any remedial action less argumentative.
- o Federal Facility Agreements at NPL sites should establish a reasonable working relationship between the states, EPA and Navy. They should clearly lay out mutual obligations. The agreements should satisfy CERCLA 120 requirements and address other aspects of CERCLA. Although much emphasis has been given to our relationship with EPA, the states are critical participants in our program and we should incorporate their interests when possible.
- o The Navy will enter into agreements only if the provisions are realistically attainable and structured to avoid



Subj: NAVY POLICY ON NATIONAL PRIORITIES LIST SITE AGREEMENTS

- o Once negotiations have been initiated, proposed changes which purport to satisfy the requirements of Section 120 of CERCLA will be discussed with the Assistant General Counsel (Administrative and Environmental Law) at (202) 746-1016.
- o Federal Facility Agreements Under CERCLA Section 120 will be signed by the Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics). Final agreements shall be forwarded to CNO (OP-45) for review and forwarding to ASN(S&L) for signature.
- o Execution of the work required by the agreement will be done by the installation and COMNAVFACECOM as per reference (b).

4. We are committed to the expeditious cleanup of our NPL sites in coordination and cooperation with the state, EPA and the local community. These Federal Facility Agreements should allow us to move forward with necessary cleanups. However, we should not let the lack of a formal agreement slow our progress. Your continued efforts in this area will show that the Navy is committed to the cleanup of our nation's environment.


S. R. ARTHUR
Vice Admiral, U. S. Navy
Deputy Chief of Naval
Operations (Logistics)

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THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-6000

PRODUCTION AND
LOGISTICS

June 17, 1988

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MEMORANDUM FOR DEPUTY FOR ENVIRONMENT, SAFETY AND OCCUPATIONAL
HEALTH, OASA (I&L)

DEPUTY DIRECTOR FOR ENVIRONMENT, OASN (S&L)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE,
(E,S&OH) SAF/RQ
DIRECTOR, DEFENSE LOGISTICS AGENCY (DLA-W)

SUBJECT: Model Provisions for CERCLA Federal Facility Agreements
at National Priority List Sites

I am pleased to provide you final model language for key provisions of CERCLA Federal Facility Agreements with the Environmental Protection Agency. This language has been mutually agreed to by EPA and DoD. Recognizing that we are committed to negotiating three-party agreements that include states, this language may need to be adjusted when you work with individual states to factor in their interests.

The attached provisions deal primarily with policy issues which required agreement between the two agencies before site-specific agreements could be finalized. The attached language shall be incorporated into the agreements you are now negotiating, and into future agreements, to insure national consistency and avoid time-consuming negotiations in these areas. Language in brackets indicates those areas which can be adjusted depending on site-specific considerations.

Please note that there are many other important parts of the agreements which the Services must negotiate, notably those sections dealing with the actual work that needs to be performed at each specific installation and the schedules to be met. Attached, therefore, is a generic table of contents which lists other important sections which could be considered for inclusion in the agreements. They do not require model language, and may not be appropriate in some cases. In the very near future, I will provide suggested language that you can use to guide Service development of provisions in these areas. It should give your installations a sense of what additional arrangements you need to consider having with EPA in these agreements.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION _____
AND THE
[STATE/Commonwealth of _____*]
AND THE
UNITED STATES [DOD COMPONENT]

IN THE MATTER OF:

The U.S. [DOD Component's]

[NAME OF FACILITY]

**FEDERAL FACILITY
AGREEMENT UNDER
CERCLA SECTION 120**

**Administrative
Docket Number:**

Based on the information available to the Parties on the effective date of this FEDERAL FACILITY AGREEMENT (Agreement), and without trial or adjudication of any issues of fact or law, the Parties agree as follows:

[* DOD and U.S. EPA agree that it is extremely important that states participate in Federal facility cleanups by joining as a Party to these agreements. DOD and U.S. EPA have not attempted to negotiate on behalf of the states in developing these model provisions. DOD and U.S. EPA recognize that state concerns and issues must be addressed at site-specific negotiations and factored into this agreement as appropriate.]

g. Notice to the Parties

- The Navy Project Manager (PM) shall receive all correspondence under this agreement. If the PM is not an activity person, the activity should also get copies of all correspondence.

h. Permits

i. Emergency Actions

j. Records of Decisions (RODs)

k. Exemptions

l. Certification

m. Other Claims

n. Reservation of Rights

o. Termination and Satisfaction

- Based upon receipt of a notice by EPA and the state that the Navy has satisfied the terms of the Agreement. Such notice will not be unreasonably withheld or delayed. Further, this section could specify EPA's responsibilities to promptly review and process the site for deletion from the NPL once the Navy has completed its obligations.

p. Community Relations

q. Public Comment

r. Preservation of Records

s. Amendment or Modification of Agreement

- Modifications are permissible only with the consent of all parties and must be in writing.

t. Effective date

- The effective date is the date the last party signs (EPA normally insists on signing last).

Please note that these additional items are not mandatory and are only provided as guidelines. Some of them may or may not be necessary depending upon size or complexity of the site, the EPA region or state involved and how far the installation restoration program has advanced at the activity. Also, when setting deadlines, it is best to discuss timeframes, not

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(iv) the [DOD Component] enters into those portions of this Agreement that relate to interim remedial actions and final remedial actions pursuant to Section 120(e)(2) of CERCLA/SARA, [Sections 6001, 3004(u) and 3008(h) of] RCRA, Executive Order 12580 and the DERP.

release and threatened release of hazardous substances, pollutants or contaminants at the Site and to establish requirements for the performance of a FS for the Site to identify, evaluate, and select alternatives for the appropriate remedial action(s) to prevent, mitigate, or abate the release or threatened release of hazardous substances, pollutants or contaminants at the Site in accordance with CERCLA/SARA.

(3) Identify the nature, objective and schedule of response actions to be taken at the Site. Response actions at the Site shall attain that degree of cleanup of hazardous substances, pollutants or contaminants mandated by CERCLA/SARA.

(4) Implement the selected interim and final remedial action(s) in accordance with CERCLA and meet the requirements of Section 120(e)(2) of CERCLA for an interagency agreement between U.S. EPA and the [DOD Component].

(5) Assure compliance, through this Agreement, with RCRA and other federal and state hazardous waste laws and regulations for matters covered herein.

(6) Coordinate response actions at the Site with the mission and support activities at [installation].

(7) Expedite the cleanup process [including, at site-specific negotiations, shortening the time frames specified in these model provisions] to the extent consistent with protection of human health and the environment.

C. The Parties recognize that the requirement to obtain permits for response actions undertaken pursuant to this Agreement shall be as provided for in CERCLA and the NCP. The Parties further recognize that on-going hazardous waste management activities at the [installation] may require the issuance of permits under Federal and State laws. This Agreement does not affect the requirements, if any, to obtain such permits. However, if a permit is issued to the [DOD Component] for on-going hazardous waste management activities at the Site, U.S. EPA shall reference and incorporate any appropriate provisions, including appropriate schedules (and the provision for extension of such schedules), of this Agreement into such permit. The Parties intend that the judicial review of any permit conditions which reference this Agreement shall, to the extent authorized by law, only be reviewed under the provisions of CERCLA.

D. Nothing in this Agreement shall alter the [DOD Component]'s authority with respect to removal actions conducted pursuant to Section 104 of CERCLA, 42 U.S.C. §9604.

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subject to review and comment by U.S. EPA. Following receipt of comments on a particular draft primary document, the [DOD Component] will respond to the comments received and issue a draft final primary document subject to dispute resolution. The draft final primary document will become the final primary document either 30 days after the period established for review of a draft final document if dispute resolution is not invoked or as modified by decision of the dispute resolution process.

2. Secondary documents include those reports that are discrete portions of the primary documents and are typically input or feeder documents. Secondary documents are issued by the [DOD Component] in draft subject to review and comment by U.S. EPA. Although the [DOD Component] will respond to comments received, the draft secondary documents may be finalized in the context of the corresponding primary documents. A secondary document may be disputed at the time the corresponding draft final primary document is issued.

C. Primary Reports:

1. The [DOD Component] shall complete and transmit draft reports for the following primary documents to U.S. EPA for review and comment in accordance with the provisions of this Part:

[Note: The list set forth below represents potential primary documents and the type of information that typically would be generated during a CERCLA cleanup at an NPL site. This list, and the list below of secondary documents, includes

Box- 00024
1209- 10-27-8

review and comment in accordance with the provisions of this Part:

1. [Initial Remedial Action / Data Quality Objectives]
2. [Site Characterization Summary]
3. [Detailed Analysis of Alternatives]
4. [Post-screening Investigation Work Plan]
5. [Treatability Studies]
6. [Sampling and Data Results]

2. Although U.S. EPA may comment on the draft reports for the secondary documents listed above, such documents shall not be subject to dispute resolution except as provided by Paragraph B hereof. Target dates shall be established for the completion and transmission of draft secondary reports pursuant to Part _____ of this Agreement.

E. Meetings of the Project Managers on Development of Reports:

The Project Managers shall meet approximately every [30] days, except as otherwise agreed by the Parties, to review and discuss the progress of work being performed at the site on the primary and secondary documents. Prior to preparing any draft report specified in Paragraphs C and D above, the Project Managers shall meet to discuss the report results in an effort to reach a common understanding, to the maximum extent practicable, with respect to the results to be presented in the draft report.

2. Unless the Parties mutually agree to another time period, all draft reports shall be subject to a 30-day period for review and comment. Review of any document by the U.S. EPA may concern all aspects of the report (including completeness) and should include, but is not limited to, technical evaluation of any aspect of the document, and consistency with CERCLA, the NCP and any pertinent guidance or policy promulgated by the U.S. EPA. Comments by the U.S. EPA shall be provided with adequate specificity so that the [DOD Component] may respond to the comment and, if appropriate, make changes to the draft report. Comments shall refer to any pertinent sources of authority or references upon which the comments are based, and, upon request of the [DOD Component], the U.S. EPA shall provide a copy of the cited authority or reference. In cases involving complex or unusually lengthy reports, U.S. EPA may extend the 30-day comment period for an additional 20 days by written notice to the [DOD Component] prior to the end of the 30-day period. On or before the close of the comment period, U.S. EPA shall transmit by next day mail their written comments to the [DOD Component].

3. Representatives of the [DOD Component] shall make themselves readily available to U.S. EPA during the comment period for purposes of informally responding to questions and comments on draft reports. Oral comments made during such discussions need not be the subject of a written response by the [DOD Component] on the close of the comment period.

4. In commenting on a draft report which contains a proposed ARAR determination, U.S. EPA shall include a reasoned

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H. Availability of Dispute Resolution for Draft Final

Primary Documents:

1. Dispute resolution shall be available to the Parties for draft final primary reports as set forth in Part ____.
2. When dispute resolution is invoked on a draft primary report, work may be stopped in accordance with the procedures set forth in Part ____ regarding dispute resolution.

I. Finalization of Reports:

The draft final primary report shall serve as the final primary report if no party invokes dispute resolution regarding the document or, if invoked, at completion of the dispute resolution process should the [DOD Component]'s position be sustained. If the [DOD Component]'s determination is not sustained in the dispute resolution process, the [DOD Component] shall prepare, within not more than 35 days, a revision of the draft final report which conforms to the results of dispute resolution. In appropriate circumstances, the time period for this revision period may be extended in accordance with Part ____ hereof.

J. Subsequent Modifications of Final Reports:

Following finalization of any primary report pursuant to Paragraph I above, U.S. EPA or the [DOD Component] may seek to modify the report, including seeking additional field work, pilot studies, computer modeling or other supporting technical work, only as provided in Paragraphs 1 and 2 below.

RESOLUTION OF DISPUTES

Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement, the procedures of this Part shall apply.

All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. If resolution cannot be achieved informally, the procedures of this Part shall be implemented to resolve a dispute.

A. Within thirty (30) days after: (1) the period established for review of a draft final primary document pursuant to Part ____ (Review of Submittals) of this Agreement, or (2) any action which leads to or generates a dispute, the disputing Party shall submit to the DRC a written statement of dispute setting forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute and the technical, legal or factual information the disputing Party is relying upon to support its position.

B. Prior to any Party's issuance of a written statement of dispute, the disputing Party shall engage the other Party in informal dispute resolution among the Project Managers and/or their immediate supervisors. During this informal dispute resolution period the Parties shall meet as many times as are necessary to discuss and attempt resolution of the dispute.

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1204 - 10-27

The U.S. EPA representative on the SEC is the Regional Administrator of U.S. EPA's Region _____. The [DOD Component]'s representative on the SEC is the [DOD Component equivalent]. The SEC members shall, as appropriate, confer, meet and exert their best efforts to resolve the dispute and issue a written decision. If unanimous resolution of the dispute is not reached within twenty-one (21) days, U.S. EPA's Regional Administrator shall issue a written position on the dispute. The [DOD Component] may, within fourteen (14) days of the Regional Administrator's issuance of U.S. EPA's position, issue a written notice elevating the dispute to the Administrator of U.S. EPA for resolution in accordance with all applicable laws and procedures. In the event that the [DOD Component] elects not to elevate the dispute to the Administrator within the designated fourteen (14) day escalation period, the [DOD Component] shall be deemed to have agreed with Regional Administrator's written position with respect to the dispute.

F. Upon escalation of a dispute to the Administrator of U.S. EPA pursuant to Subpart E, the Administrator will review and resolve the dispute within twenty-one (21) days. Upon request, and prior to resolving the dispute, the U.S. EPA Administrator shall meet and confer with the [DOD Component]'s Secretariat Representative to discuss the issue(s) under dispute. Upon resolution, the Administrator shall provide the [DOD Component] with a written final decision setting forth resolution of the dispute. The duties of the Administrator set forth in this Part

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Following this meeting, and further consideration of the issues, the Division Director will issue, in writing, a final decision with respect to the work stoppage. The final written decision of the Division Director may immediately be subjected to formal dispute resolution. Such dispute may be brought directly to the either the DRC or the SEC, at the discretion of the [DOD Component].

I. Within twenty-one (21) days of resolution of a dispute pursuant to the procedures specified in this Part, the [DOD Component] shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Agreement according to the amended plan, schedule or procedures.

J. Resolution of a dispute pursuant to this Part of the Agreement constitutes a final resolution of any dispute arising under this Agreement. All Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part of this Agreement.

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violation of such term, condition, timetable, deadline or schedule will be subject to civil penalties under Sections 310(c) and 109 of CERCLA.

B. Nothing in this Agreement shall be construed as authorizing any person to seek judicial review of any action or work where review is barred by any provision of CERCLA, including Section 113(h) of CERCLA.

C. The Parties agree that all Parties shall have the right to enforce the terms of this Agreement.

dispute resolution procedures related to the assessment of the stipulated penalty.

C. The annual reports required by Section 120(e)(5) of CERCLA shall include, with respect to each final assessment of a stipulated penalty against the [DOD Component] under this Agreement, each of the following:

1. The facility responsible for the failure;
2. A statement of the facts and circumstances giving rise to the failure;
3. A statement of any administrative or other corrective action taken at the relevant facility, or a statement of why such measures were determined to be inappropriate;
4. A statement of any additional action taken by or at the facility to prevent recurrence of the same type of failure; and
5. The total dollar amount of the stipulated penalty assessed for the particular failure.

D. Stipulated penalties assessed pursuant to this Part shall be payable to the Hazardous Substances Response Trust Fund only in the manner and to the extent expressly provided for in Acts authorizing funds for, and appropriations to, the DOD.

E. In no event shall this Part give rise to a stipulated penalty in excess of the amount set forth in Section 109 of CERCLA.

DEADLINES

[This model provision assumes no investigatory work is in progress at the site and no schedules have been previously established for study work. The degree of specificity and completeness of the deadlines contained herein shall be based upon information possessed at the time of development of the site-specific agreement.]

A. The following deadlines have been established, in conjunction with the State, for the submittal of draft primary documents pursuant to this Agreement:

1. [Scope of Work]

B. Within twenty-one (21) days of the effective date of this Agreement, the [DOD Component] shall propose deadlines for completion of the following draft primary documents:

2. [RI/FS Work Plan, including Sampling and Analysis Plan and QAPP]
3. [Risk Assessment]
4. [RI Report]
5. [Initial Screening of Alternatives]
6. [FS Report]
7. [Proposed Plan]
8. [Record of Decision]

Within fifteen (15) days of receipt, EPA, in conjunction with the State, shall review and provide comments to the [DOD Component] regarding the proposed deadlines. Within fifteen (15) days following receipt of the comments the [DOD Component] shall, as appropriate, make revisions and reissue the proposal. The Parties shall meet as necessary to discuss and finalize the proposed deadlines. If the Parties agree on proposed deadlines, the finalized deadlines shall be incorporated into the

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XXXI. EFFECTIVE DATE

31.1. The effective date of this Agreement shall be the date upon which it has been executed by all the Parties.

31.2. Any timetable and deadlines, schedules, or records of decision (RODs) required by this Agreement are effective upon finalization and incorporated into this Agreement.

EXTENSIONS

A. Either a timetable and deadline or a schedule shall be extended upon receipt of a timely request for extension and when good cause exists for the requested extension. Any request for extension by the [DOD Component] shall be submitted in writing and shall specify:

1. The timetable and deadline or the schedule that is sought to be extended;
2. The length of the extension sought;
3. The good cause(s) for the extension; and
4. Any related timetable and deadline or schedule that would be affected if the extension were granted.

B. Good cause exists for an extension when sought in regard to:

1. An event of force majeure;
2. A delay caused by another party's failure to meet any requirement of this agreement;
3. A delay caused by the good faith invocation of dispute resolution or the initiation of judicial action;
4. A delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable and deadline or schedule; and
5. Any other event or series of events mutually agreed to by the Parties as constituting good cause.

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G. A timely and good faith request for an extension shall toll any assessment of stipulated penalties or application for judicial enforcement of the affected timetable and deadline or schedule until a decision is reached on whether the requested extension will be approved. If dispute resolution is invoked and the requested extension is denied, stipulated penalties may be assessed and may accrue from the date of the original timetable, deadline or schedule. Following the grant of an extension, an assessment of stipulated penalties or an application for judicial enforcement may be sought only to compel compliance with the timetable and deadline or schedule as most recently extended.

FUNDING

It is the expectation of the Parties to this Agreement that all obligations of the [DOD Component] arising under this Agreement will be fully funded. The [DOD Component] agrees to seek sufficient funding through the DOD budgetary process to fulfill its obligations under this Agreement.

In accordance with Section 120(e)(5)(B) of CERCLA, 42 U.S.C. §9620(e)(5)(B), the [DOD Component] shall include in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

Any requirement for the payment or obligation of funds, including stipulated penalties, by the [DOD Component] established by the terms of this Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

If appropriated funds are not available to fulfill the [DOD Component]'s obligations under this Agreement, U.S. EPA reserves the right to initiate an action against any other person, or to take any response action, which would be appropriate absent this Agreement.

Funds authorized and appropriated annually by Congress under the "Environmental Restoration, Defense" appropriation in the

Section 120(e)(5) report to Congress. No payments will be made except as expressly provided for in Acts authorizing funds for, and appropriations to, the DoD. This provision is structured to provide a meaningful incentive for meeting commitments, consistent with our existing authority, control and resources. Unlike the situation in the TCAAP agreement, EPA did not explicitly reserve the right to seek additional civil penalties under the statute.

4. CERCLA/RCRA Integration. The agreed language is consistent with the United States' legal position that compliance with corrective action and other RCRA requirements is achieved at NPL Sites through the CERCLA Cleanup Process, and thus NPL Sites where response action has been commenced pursuant to CERCLA are not subject to further RCRA corrective action.

5. Citizen Suits. Since the law does not oblige the parties to include the RI/FS process in the agreement, it was structured in an effort to avoid delaying that already protracted process by litigation not reflecting any disagreements between the parties. The Enforcement section reflects those matters that are subject to citizen suit, and all the parties accept the legal proposition that Federal agencies established as part of the Executive Branch cannot constitutionally, by agreement or otherwise, expand the subject matter jurisdiction of an Article III court beyond that provided by law. DOJ expressed the view that CERCLA sections 310 and 113(h), read together, do not allow a citizen suit to be brought until after completion of response action, where the suit alleges that response action undertaken pursuant to Sections 104 or 106 of CERCLA violates the requirements of CERCLA.

6. Consultation with EPA. The second paragraph under "A. Applicability" is intended solely to clarify that our designation of a document as "final" does not imply that public comments required by law to be invited are either too late, not desired or otherwise precluded from meaningful consideration.

7. Deadlines. This provision was structured to allow the DoD component to propose realistic deadlines, at junctures when predictability is possible. Read in conjunction with the sections on Extensions, Force Majeure, and Funding, the agreement's intent is to preserve the initiative for the DoD component and make responsibility coextensive with authority and control. In recognition of the considerable uncertainty that inheres in the RI/FS process, the provision on Deadlines includes a specific reference to fact-of-life adjustments stemming from significant new information (i.e., the parties should not view such adjustments as reflecting negatively upon their roles).